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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

Petitioners' Reply to Illinois' Brief in Opposition to the Petition for a Writ of Certiorari

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REASONS FOR GRANTING THE WRIT

I. As Even The Trial Court Recognized, Illinois' "Proof" Of A Health Hazard Was Speculative; *Absolutely No* Demonstrative Evidence Of A Nuisance Was Presented, Even Though Empirical Tests Could And Should Have Been Performed By Illinois.

The first fifteen pages of the Illinois brief in Opposition to the Petition for a Writ of Certiorari captioned "Statement of the Case", rather than setting forth the proceedings below concisely and without argument as an assistance to this Court in approaching the limited question before this Court — "Should

a writ of certiorari be granted?", are more in the nature of a jury argument. Those fifteen pages, rather than clarify, obfuscate the issues before this Court at this time.

The recitation of argumentative speculation by Illinois fails to state that *not one single pathogen* was shown in the record to actually *exist in* the waters of Lake Michigan either in Wisconsin or in Illinois; not one single pathogen *from any source,* much less one tied to a discharge from the Petitioners' sewer system. Additionally, the recitation fails to reflect the fact that the record does *not* show *a single infection or disease caused by a pathogen traceable to Lake Michigan* waters in either Wisconsin, where the discharge source exists, or in Illinois which is at a minimum of twenty-five miles away from the discharge source. Just as no single infection or disease has been shown to exist as a result of pathogens existing in Lake Michigan waters, so no outbreak or epidemic has been shown to have occurred in either state much less to have occurred and been a result of pathogens found in Lake Michigan waters.

It is however a matter of record that the types of pathogens which are being considered are by their nature pathogens which would cause infections or diseases to be manifest in relatively short periods of time. The record also shows that the discharges complained of by the State of Illinois have been consistently made for approximately 100 years during Milwaukee's existence. Illinois fails to explain how these *discharges occurred over this 100 year period without any adverse results occurring anywhere* and how, in view of those facts, they could be supportive of a health hazard nuisance claim in distant Illinois.

Even the District Court acknowledged that the proof presented by Illinois consisted of the speculations of experts and lacked any demonstrative or empirical evidence of nuisance. The District Court commented on Illinois' approach as follows:

> "Now, the State of Illinois had an opportunity to conduct its own study of the kind that Envirex conducted. It elected not to do so. In so electing, it is my opinion that *the state chose to produce*

> *less evidence than it should have.* My guess as to why they elected not to conduct their own study is that they were afraid of a negative result. Conducting such studies is dangerous, because, of course, they cut both ways; but if the position of the State of Illinois is correct, as I believe it is, a properly conducted study should have resulted in *some circumstantial* evidence that would tend to confirm that *theory.*
>
> "The test would have had to be conducted without the infirmities that I have mentioned in regard to the Envirex studies, and *that could have been done.* In fact, *negative results would not have been fatal to* the plaintiffs' case." (App. F-10) (emphasis added)

One would expect from a reading of the Illinois statement of the case that the discharge of fecal waste inexorably leads to the outbreak of disease. But, this is historically false with respect to Milwaukee's discharges in particular, and with respect to sewage discharges generally. The January 1974 *Annual Report Of The Administrator Of The Environmental Protection Agency To The Congress Of The United States In Compliance With Section 26(a) Of The Federal Water Pollution Control Act* at page 12 reflects the extremely tenuous nature of Illinois' contentions:

> "*An assessment of health hazards from polluted water involves considerable uncertainty.* There is little doubt that human feces carry infectious pathogens for a number of intestinal diseases, typhoid fever, hepatitis, brucellosis, encephalities, poliomyelities, psittacosis, and tuberculosis. *However, there are grave uncertainties about the die-off rates of pathogens in natural waters as well as their infectiousness for swimmers or other recreational water users.* Note that the issue of drinking water is not at stake, since its safety depends on disinfection

> treatment by the water supply system. *The evidence that water polluted with fecal matter can transmit diseases to swimmers is sparse and uncertain,* particularly since it has been discovered that swimmers in unpolluted water also have higher incidences of common ear, eye, and nose infections." (emphasis added)

II. Respondents Did Not Stipulate To The Remedy Ordered By The Trial Court; They Stipulated To An Engineering Definition Of What Relief Was Ordered By The Court's Decision.

Fairness also requires comment on the characterization of the remedy ordered by the District Court at pages 10-11 of the Illinois brief. Illinois would have this court believe that Milwaukee "selected" the remedy to be imposed upon it, both from the standpoint of method and timing. Nothing could be farther from the truth. Illinois knows full well that the Judgment Order entered by the District Court was accompanied by a stipulation of the parties that the Judgment Order as agreed to by the parties was the required *mirror image* of the District Court's decision which merely carried out in engineering terms that which the Court had already decided. The stipulation, in relevant part, provides as follows:

> "It is hereby stipulated by and between the parties hereto that the relief necessary to achieve the effluent quality required by the decisions of this court heretofore rendered herein is set forth in the proposed Judgment Order, copy of which is attached.
>
> "This stipulation is entered into for the purpose of presenting to the court the specific engineering solutions, with scheduling and effluent standards, required to carry out the general Findings and Conclusions and the general requirements which this court has imposed on the defendants herein in such decisions. Its sub-

> mission is made to avoid the necessity of adducing extensive expert testimony before the court directed to the same purpose.
>
> * * *
>
> "Other than as set out above, this stipulation is entered into without prejudice to the rights of any of the defendants to appeal from the ultimate judgment entered herein upon any and all grounds ..." (App. E 1-3)

Illinois then in passing states that Milwaukee has recently exposed figures to Illinois that indicate there is really a cost saving in eliminating rather than controlling by-passes and overflows if done by the means of sewer separation (not now permitted under the judgment below) rather than by the convey, store and treat method ordered. A fiscally responsible approach to the massive public expenditures imposed upon Milwaukee by the judgment below has caused the expenditure of millions of dollars and tens of thousands of man hours in an attempt to comply with the judgment below in a cost effective manner. True, the result of this effort may well lessen the total fiscal impact of the judgment. However, study of eliminating by-passes and overflows, as distinguished from *controlling* them, indicates that the costs of elimination exceed those involved for control by sums in the hundreds of millions of dollars, even disregarding the many legal and practical problems which may foreclose the use of some of the less costly methods investigated. The investigative work is ongoing but it is absurd to assert, as Illinois does, that the total elimination of overflows and by-passes can ever be just equal to or even be less than the cost of an environmentally sound cost effective solution. That is why Chicago chose a method which would only "control" rather than "eliminate" overflows and is presently struggling to proceed with the largest public works project in the history of this country to achieve even that presumably cost effective "control" objective. (See text and citations at pp. 19-20 of the Petition for a Writ of Certiorari)

III. Illinois' Arguments On The Merits Are Erroneous, As Well As Inappropriate At This Juncture.

A. The FWPCA Does Not Give Illinois Extra-Territorial Sovereignty To Permit It To Legislate For Wisconsin Discharges.

At pages 16 through 28 of its brief Illinois makes three substantive arguments as though a writ of certiorari had issued rather than addressing whether or not the writ should issue. Nevertheless, all of them are without merit. Illinois begins by asserting that the district court's order on eliminating by-passes is not contrary to the Federal Water Pollution Control Act (FWPCA). Examination of the act against the order reflects the contrary. Illinois' position is based primarily on the preservation of pre-existing rights under FWPCA and the preservation of the right of states to impose more severe limitations *within their own borders* than those imposed by the act. But Illinois does not meet the fact that it has selected *federal common law* as its basis of action and federal common law is controlled by federal statute, a federal statute which with the regulations and permits issued pursuant to it provide for all of the matters in this case. Likewise, Illinois fails to recognize that a right in Illinois to impose more severe limitations on discharges within its borders than those found in FWPCA does not accord Illinois the extra territorial sovereignty to permit Illinois to legislate for Wisconsin discharges.

In this section of its argument, Illinois would draw great comfort from a number of decisions which either deny or refuse to reach preemption of federal common law nuisance claims. Illinois fails to draw attention to the fact that those cases which deny preemption were, like the forerunner of this case in this Court, *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972), decided before FWPCA and the regulations thereunder were the fully operative and pervasive system that they now are. The most significant point, totally missed by Illinois, is that the application of the federal common law of nuisance to interstate waters has its genesis in decisions of this court. Only this court can finally and authoritatively determine and put to rest the

nationally significant issues anticipated by this court to arise from the enactment of a federal statute and regulations of the scope set forth in FWPCA.

The Supreme Court in *Illinois v. Milwaukee, supra,* expressly pointed to the potential preemptive effect of the statute and regulations: "It may happen that new federal laws *and new federal regulations* may in time preempt the field of federal common law of nuisance." (emphasis added) 406 U.S. at 107. Illustrative of other decisions since then are: *Township of Long Beach v. City of New York,* 445 F.Supp. 1203, 1215 (D.N.J. 1978), ["I will therefore deny the motion to dismiss based on preemption without prejudice to a renewal thereof after further clarification of the nature of this suit, the new regulations and their effect on the preemption issue"]. *United States ex rel. Scott v. United States Steel Corp.,* 356 F.Supp. 556, 559 (N.D. Ill. 1973) ["At least until the Environmental Protection Agency has acted effectively, the hands of the plaintiff governments are not tied."]; *United States v. Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 119-120 (D. Vt. 1973), aff'd. mem. 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1973) [prior to regulations]; *Stream Pollution Control Bd. v. United States Steel Corp.,* 512 F.2d 1036 (7th Cir. 1975) [unnecessary to decide]; *People ex rel. Scott v. City of Milwaukee,* 366 F.Supp. 298, 299-300 (N.D. Ill. 1973) [prior to regulations]; *Reserve Mining Co. v. Environmental Protection Agency,* 514 F.2d 492, 532 (8th Cir. 1975) ["[W]e deem it unnecessary and, indeed, unwise to also rely on federal nuisance law."]. *Committee for the Consideration of the Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1009 (4th Cir. 1976) [states it is an anomaly to allow federal common law to prohibit what a federal permit legitimates]. Two cases cited by Illinois with respect to the preemption of federal common law, *Metropolitan Sanitary Dist. v. United States Steel Corp.,* 30 Ill. App.3d 360, 332 N.E.2d 426 (1st Dist. 1975), cert. denied 424 U.S. 976 (1976) and *People ex rel. Scott v. United States Steel Corp.,* 40 Ill. App.3d 607, 352 N.E.2d 225, 229 (1st Dist. 1976), do not even mention the subject of preemption of the *federal* common law.

B. Like *Missouri v. Illinois*, Illinois' Case Lacks The Evidence Needed To Establish A Federal Common Law Nuisance.

Under its next argument, Illinois' principal reliance is on a statement that the Court of Appeals made an exhaustive analysis of the evidence. Most significantly, Illinois fails to explain the absence of pathogens in Lake Michigan, an evidentiary failure that the district court specifically found, and which was not commented upon by the Court of Appeals. This coupled with the lack of any showing of disease flies in the face of the evidentiary requirements of this Court, reviewed in *Missouri v. Illinois,* 200 U.S. 496, 522-523 (1906) vis:

> "The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved; [No enteroviral outbreaks were shown in the Milwaukee case now before the Court] and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.
>
> We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted."

As Petitioners said in their Petition: "While the evidence before the Court in *Missouri v. Illinois* was strikingly similar to

and considerably stronger than that present here (in the absence of tests that could and should have been performed by plaintiff), the result reached by the Supreme Court is the opposite of that reached by the courts below — the Supreme Court dismissed the case!"

We must note that Illinois also makes what can only be described as a misleading comment on Illinois' discharges to Lake Michigan. Illinois professes that it has eliminated or will eliminate all discharges to Lake Michigan. The record is contrary. Trial Transcript pp. 4026-4034, 13444-13445, 13450; D. Ex. 170 p. 9; GAO, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution — A National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979) Vol. 1 p. 18. Additionally, Illinois' regulatory position in respect of all of its *intrastate* waters, where protection of its citizens should be of most serious concern to the State of Illinois, is not commensurate with the level of effluent purification Illinois would impose on Milwaukee at least 25 miles away. It cannot be too strongly emphasized that the Illinois brief makes no response to the undisputed facts appearing at pages 41 through 43 of the Petition for Writ of Certiorari that Illinois does not require of its own citizens the type of conduct it seeks to impose upon Milwaukee. The Illinois approach throughout this case has been and continues to be "Do as we say, not as we do", an approach which this Court condemned more than 70 years ago. See *Missouri v. Illinois,* 200 U.S. at 522 (1906).

In short, the physical facts — no pathogens found in Lake Michigan and no disease occurrence — coupled with Illinois'actions in continuing by-passes of its own sewage and imposing less stringent effluent requirements in its own waters, belie Illinois' evidentiary assertions.

C. This Case Raises Critical Questions Concerning The Reach Of Jurisdiction In A Federal Common Law Nuisance Case.

In the discussion of the jurisdictional positions under its third argument, Illinois fails to address the importance of the question to the governance of trial courts in interstate matters, but rather argues only the substance of the jurisdictional arguments. Again, that substance is not really before this Court at this stage of the proceeding, but the importance of the question presented is central to the question: "should the writ issue?"

This is not a matter of the interpretation and application of an Illinois long arm statute as construed by the Illinois Supreme Court. It is a question of the reach of jurisdiction in a federal common law nuisance case; a case involving interstate waters arising out of a municipal discharge in one state claimed by another state to be violating its rights in the interstate waters. It presents the question of whether an out-of-state municipality can be subject to a federal district court action in the complaining state seeking injunctional relief operating upon the municipality outside the complaining state's geographical jurisdiction.

Swept up in the substance of the issues presented under this head are such questions as whether a federal common law nuisance is a transitory tort; whether a municipality can act extra territorially; and whether venue in this matter can properly be laid outside the district in which the municipality exists and the discharges occur. These questions were, like all the other questions raised in our petition, briefed and argued below and all present important federal questions not definitively addressed by this Court to date with the exception of the venue issue. Petitioners believe that the venue question as dealt with in *Leroy v. Great Western United Corp.*, 61 L.Ed. 2d 464 (1979), ____ U.S. ____, decided by this Court on June 26, 1979, requires dismissal of this action or vacation of the judgment herein and transfer to the Eastern District of Wisconsin. Though Petitioners' position on this point and the *Leroy* case were presented and cited in their Petition, we note with interest

that Illinois devotes one and one half pages of the twelve-page argument in its brief to venue, without once mentioning this latest pronouncement by this Court on the statute directly applicable to this action. In any event, the questions and issues can be expected to occur in the lower federal courts in numerous and important contexts requiring guidance by this Court in the interest of judicial efficiency and harmony.

While Petitioners do not believe that argument of the substance of this case is appropriate until the writ is granted herein, Petitioners could not conscientiously permit the erroneous positions Illinois took in its Brief in Opposition to the Petition herein to stand completely without challenge in the interim. We have therefore in very summary fashion dealt with the most egregious of those erroneous positions. We now address the real question before the Court on the pending petition herein.

IV. A Most Important Federal Question Is Present Here.

At no point in its brief in opposition to the Petition for Writ of Certiorari does Illinois in any way address the basis of the Petition herein, namely, that this case presents, and no more important federal question could be presented than, a federal question which includes:

1. The relationship between federal statutory law and federal common law;

2. The governance of conduct in two or more states affecting the nation's water resources;

3. Fiscal responsibility of a degree presenting possible bankruptcy to communities and refunding hardships to the nation as a whole;

4. The determination of whether all of the issues must be uniformly determined for all of the nation's waters or be subject to *ad hoc,* parochial departures from evenhanded approaches; and

5. The determination of the issue of *in personam* jurisdiction over, and the proper venue for actions dealing with, point source discharges by municipalities.

Illinois' argument in no way detracts from the proposition that all of these factors are present here and that it is of national importance that a definitive answer be given to that question by this Court.

Illinois completely bypasses the entire basis for the Petition herein. Illinois nowhere discusses the five important federal concerns this Court should set at rest. Quite clearly Illinois has chosen not to address the question of whether or not this Court should speak on the national issues here presented, rather Illinois makes only substantive arguments; arguments attempting to persuade this Court that there was no error of substance below. The arguments miss the point that a petition for certiorari and the responsive brief should be directed to why this Court should or should not issue its writ. True enough, the substance of the decisions below will be involved as a setting for that consideration but it is the importance of the federal question presented, not the correctness or incorrectness of the decision below (which can properly be reached only after a full opportunity to brief and consider the issues), which calls for the issuance of the writ. Of critical significance is the fact that, as a matter of law, denial of the writ does not set the questions presented below to rest. It is axiomatic that denial of the writ has no precedential effect. Only through the issuance of the writ herein followed by a full briefing of the substance of this case and decision by this Court will these most important federal questions be set at rest.

CONCLUSION

It is respectfully submitted that the Writ should issue as prayed for in the Petition herein.

Respectfully submitted,

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